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No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,

Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia

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BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party rule governing eligibility to participate in the process of nominating a candidate for United States Senate?

2. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party's decision to hold a convention and to impose a non-waivable $45 fee on all voters who wish to participate in the process of nominating that party's candidate for United States Senator?

3. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party's decision to hold a convention and to impose a non-waivable $45 filing fee on all candidates for the position of delegate to a state convention called to nominate that party's candidate for United States Senator?

4. Can individual voters who have been forced to pay an illegal poll tax or who claim to have been deterred from participating in an election by the existence of such a tax bring suit under section 10 of the Voting Rights Act, which explicitly outlaws poll taxes?

PARTIES

The following were parties in the courts below:

Fortis Morse;

Kenneth Curtis Bartholomew; and

Kimberly J. Enderson

Plaintiffs;

The Oliver North for U.S. Senate Committee, Inc.;

The Republican Party of Virginia; and

The Albemarle County (Virginia) Republican Committee

Defendants.

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OPINIONS BELOW

The opinion and order of the three-judge district court are contained in the Appendix to the Jurisdictional Statement [hereafter "J.S. App."], at pages A-2 to A-13; the opinion is reported at 853 F. Supp. 212 (W.D. Va. 1994).

JURISDICTION

The district court entered judgment against appellants on May 18, 1994. J.S. App. at A-13. The Notice of Appeal was filed on June 8, 1994. J.S. App. at A-19. This Court

noted probable jurisdiction on January 23, 1995. This Court's jurisdiction rests on 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

This case involves section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973c, which is reprinted in the J.S. App. at pages A-15 to A-17, and section 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973h, which is reprinted in the J.S. App. at pages A-17 to A-18. It also involves section 14(c)(1) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(c)(1), which provides, in pertinent part:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, ... casting a ballot and having such ballot counted properly with respect to candidates for public or party office ....

STATEMENT OF THE CASE

Article II, § 4 of the Constitution of Virginia states that "[t]he General Assembly shall provide for the nomination of candidates ... and shall have power to make any other law regulating elections not inconsistent with this Constitution." Pursuant to Art. II, § 4, Virginia law sets out two methods for placing candidates for United States Senator on the general election ballot. "Independent" candidates must submit a petition of candidacy demonstrating a significant level of voter support across the state. Va. Code § 24.2-

506.[1] Nominees of "political parties," by contrast, are placed on the general election ballot automatically. *See* Va. Code § 24.2-511.

"Political party" is a legal term of art.[2] Under Virginia law, only two organizations qualify for the status of "political parties" and its attendant benefit of automatic access to the general election ballot: the Democratic Party of Virginia and one of the appellees in this case, the Republican Party of Virginia ("RPV" or "the Party").[3]

Virginia pervasively regulates and confers advantages on the party nomination process for senatorial candidates. The Commonwealth permits parties with automatic ballot access to make nominations by convention as well as by primary. *See* Va. Code § 24.2-508. But notwithstanding the general right of political parties to choose how to nominate senatorial candidates, a party

> "whose candidate at the immediately preceding election ... (i) was nominated by a primary or filed for a primary but was not opposed and (ii) was

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1 Section 24.2-506 requires that candidates for United States Senate submit petitions equal to one-half of one percent of the number of registered voters, with at least 200 voters from each congressional district. To get on the general election ballot in 1994 required roughly 15,000 signatures.

2 "'*Party*' or '*political party*' means an organization of citizens of the Commonwealth which, at either of the two preceding statewide general elections, received at least ten percent of the total vote cast for any statewide office filled in that election. The organization shall have a state central committee and an office of elected state chairman which have been continuously in existence for the six months preceding the filing of a nomination for any office." Va. Code § 24.2-101.

3 *See* 1986-1987 Op. Atty Gen. Va. 204.

> elected at the general election, shall nominate a candidate for the next election for that office by a primary unless all incumbents of that party for that office consent to a different method."

Va. Code § 24.2-509(B). Thus, the Commonwealth delegates control over the choice between primaries and conventions either to a publicly elected official -- the incumbent Senator of a political party -- or to party officials in the absence of a public official from the relevant party. In the case of the RPV, Virginia law gave the Party *carte blanche* over the method of nominating its senatorial candidate in 1994, since that seat was held by a Democrat. In 1996, however, the RPV's autonomy will be restricted, since § 24.2-509(B) apparently gives the incumbent Republican Senator, John Warner, the right to require a primary if he so chooses.[4]

When a party chooses to nominate its senatorial candidate by convention, Virginia law imposes several requirements. For example, the party must nominate its candidate for a general election in November "by 7:00 p.m. on the second Tuesday in June," Va. Code § 24.2-510. At the same time, the party convention cannot occur too early in the electoral cycle: "a party shall nominate its candidate for any office by a nonprimary method only within the thirty-two days immediately preceding the primary date established for nominating candidates for the office in question." *Id.*; *see also* Va. Code § 24.2-511 (setting out procedures for certifying the nomination of candidates nominated by a convention to the State Board of Elections). The legislative

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4 The nomination for Senator Warner's seat at the last election in 1990 was scheduled to be made by a primary, but the primary was cancelled when no candidate filed to oppose him. Joint Appendix 24 (hereafter "J.A.").

committee that prepared the 1970 revision of § 24.2-511's predecessor explained its purpose as being to "place all party nominees in the same relative position before elections whether nominated by primary, convention, endorsement or other means." Report of the Election Laws Study Commission, H. Doc. No. 14, at 86 (1969).

Over the past three decades, the RPV has used a variety of methods for nominating its candidates for U.S. Senator. In 1964 and 1978, for example, the Party's State Central Committee chose the nominee, while in several other years, the nominee was chosen by a statewide convention. In 1990, the RPV decided to choose its nominee by primary, but the primary was cancelled when no challenger opposed the renomination of the Republican incumbent.

In December 1993, the Central Committee decided to return to selecting the party's nominee through a convention. Accordingly, it issued a call for a convention to occur over the first weekend in June 1994. All registered voters who were in accord with the Party's principles and who were willing if requested to declare "their intent to support all of its nominees for public office in the ensuing election," J.A. 61, were entitled to participate in local mass meetings to "elec[t]" delegates to the state convention. J.A. 62.[5] But any voter who wished to participate at the state level, where the actual nominating decision was made, was required to file as a "delegate" and pay a non-waivable $35 or $45 registration fee.

Under the RPV's own rules, delegates were to be "elected" at the mass meetings to attend the convention. J.A. 62. In fact, however, as a matter of longstanding party

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5 Virginia does not have party registration.

practice, J.A. 6,[6] *any* voter who pledged to support the Party's nominee and paid the fee was certified as a delegate and, when he or she reached the convention, was free to vote for the candidate of his or her choice.[7] Over 14,600 voters were certified as "delegates" eligible to attend the convention and vote their preferences. In effect, the state convention operated, as it had in the past, as a "great indoor primary," Frank B. Atkinson, The Dynamic Dominion: Realignment and the Rise of Virginia's Republican Party Since 1945, at 343 (George Mason Univ. Press 1992).

Although the RPV has imposed a variety of different "filing fees" over the years, *see* J.A. 24, it has neither sought nor received preclearance either of any of those fees or of its shifts between methods of nominating senatorial candidates.

Appellants Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly Enderson are registered voters in Virginia. Morse and Enderson have long been active in Republican politics; Bartholomew is an independent. All three wanted to participate in selecting the Party's 1994 senatorial nominee and were legally qualified to do so.

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6 Because this case is before the Court on appellees' motion to dismiss, the factual allegations in the complaint must be taken as true. *See also* Transcript of Oral Argument at 30 (May 18, 1994) (statement of counsel for the RPV that while the party's rules provide for the selection of delegate slates and for the "instruct[ion of] delegations" on how to vote, "the campaigns, as a matter of tactics to maintain Party unity, haven't been doing it").

7 The weight attached to an individual's vote is governed by a formula that takes into account the level of support for Republican presidential and gubernatorial candidates in the voter's city or county. Appellants have not challenged any of the Party's internal rules regarding how voting at conventions is to be conducted.

Both Bartholomew and Enderson, however, were deterred from attending the convention by the $45 fee. Thus, they were completely excluded from the process of nominating a Republican candidate for United States Senate.

On February 28, 1994, Morse sought, from appellee Albemarle County Republican Committee (which under party rules was responsible for collecting the fee and certifying "delegates"), a waiver of the $45 fee on the grounds of economic hardship. A Committee official told Morse that the fee was mandatory but informed him that one of the candidates was paying the fees of voters who supported that candidate. Ultimately, the Albemarle County Coordinator of the Oliver North for U.S. Senate Committee gave Morse $45 to reimburse him for the fee, indicating that if Morse did not attend the convention "we'll hunt you down." Morse subsequently repaid the $45 to the North Committee and attended the convention, where he supported North's rival, James Miller.

Following investigation of the pervasiveness of the reimbursement scheme and their potential legal claims, appellants filed this lawsuit in the United States District Court for the Western District of Virginia.[8] They alleged that the filing fee constituted a "standard, practice, or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act; because the Party had never received preclearance for the fee, or its decision to raise the fee over time, its imposition violated section 5.

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8 The district court stated that the appellants delayed over five months in filing this action. J.S. App. at A-5. This statement presupposes that appellants should have filed suit as soon as the call for the convention was issued in December 1993, rather than in May 1994. This would have required them to act without first attempting to file or to seek a waiver, as appellant Morse did, and without any investigation of the factual or legal bases of their claims. *See* Fed. R. Civ. P. 11.

They also alleged that the Party's imposition of a filing fee violated section 10 of the Voting Rights Act, which prohibits the use of poll taxes or substitutes therefor. In addition to these statutory claims against the Party and the Albemarle County Republican Committee, appellants raised constitutional challenges to the fee under the Equal Protection Clause of the Fourteenth Amendment and the Twenty-Fourth Amendment. Finally, they alleged that the North campaign's practice of paying or offering to pay the fee for voters who indicated a commitment to support Oliver North violated section 11 of the Voting Rights Act of 1965 as amended. They invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343 and under 42 U.S.C. §§ 1973h(c) and 1973j(f).

Appellants did *not* seek to halt, delay, or disrupt the convention. Rather they sought only an injunction permitting all individuals who were otherwise qualified -- because they were registered voters prepared to pledge their support to the ultimate Republican nominee -- to attend the convention. In addition, they sought declaratory relief and a permanent injunction against requiring a registration fee unless federal preclearance was first obtained, as well as restitution of the registration fee paid by appellant Morse.

A three-judge district court was convened to hear appellants' section 5 and section 10 claims. After an expedited briefing process, that court held oral argument on May 18, and on the same day issued its opinion. It remanded appellants' constitutional and section 11 claims to the single-judge district court[9] and dismissed appellants'

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[9] Appellants do not challenge the three-judge court's decision to remand their constitutional and section 11 claims to the single-judge court. Simultaneously with their filing of the Notice of Appeal in this proceeding, appellants voluntarily dismissed their section 11 claim against the Oliver North for U.S. Senate Committee, since the convention had already occurred and they had sought only declaratory and injunctive relief against that defendant. J.A. 2, 65. Appellants also moved to postpone consideration of their constitutional claims against the RPV and the Albemarle County Republican Committee pending this Court's resolution of the statutory issues presented by this appeal. The single-judge district court granted that motion on October 19, 1994. J.A. 3.

claims under sections 5 and 10.

With regard to appellants' section 5 claim, the district court recognized that section 5 extends to political parties. But it thought that section 5's reach was limited to a party's conduct of a primary election. The district court held that neither a party's practices relating to a nominating convention nor the process of selecting delegates to such a convention through mass meetings or party canvasses was subject to section 5 review. *See* J.S. App. at A-8 to A-11. According to the district court, the result was compelled by this Court's summary affirmance in *Williams v. Democratic Party of Georgia*, 409 U.S. 809 (1972).

With regard to appellants' section 10 claim, the district court held that the Act did not authorize suits by private citizens. It concluded that only the Attorney General is authorized to bring suit against illegal poll taxes. J.S. App. at A-11 to A-12. Individual voters who have been forced to pay such a tax, or who have been deterred from voting because of it, the district court declared, have no cause of action under section 10.

SUMMARY OF ARGUMENT

Virginia has had a long history of excluding people from the franchise for financial reasons. *See, e.g., Harman v. Forssenius*, 380 U.S. 528 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). This case presents a challenge to a financial condition imposed by the RPV in its capacity as a state actor involved in deciding which candidates for United States Senator will appear on the general election ballot. Section 5 of the Voting Rights Act provides that changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" imposed within the Commonwealth of Virginia require federal preclearance before they can be implemented; the RPV's exaction of a $45 fee to participate fully in the process of nominating a senatorial candidate is such a change. Section 10 of the Voting Rights Act was intended to vindicate voters' constitutional entitlement to participate in an election process free from the imposition of financial conditions; appellants, as voters whose rights were impaired by the RPV's $45 fee, are entitled to use the Act's procedures to secure their rights.

Affirmance of the district court's decision would resurrect precisely the dangers that prompted the enactment of the Twenty-Fourth Amendment; the passage, amendment, and extension of the Voting Rights Act; and this Court's decision in *Harper*. Under the rationale advanced by the RPV and subscribed to by the district court, states and political parties could evade these constitutional and statutory guarantees by "privatizing" the political process, in clear violation of this Court's decision in *Terry v. Adams*, 345 U.S. 461 (1953). Section 5's preclearance regime was enacted precisely to prevent such circumvention. In particular, the exaction of a fee to take part in the nomination

process threatens the sorts of discrimination and vote buying that motivated Congress to ban poll taxes and to require preclearance of new qualifications for participation.

Moreover, by requiring plaintiffs such as the appellants in this case to proceed against exclusionary practices under the Constitution directly, rather than requiring entities who seek to use such practices to obtain preclearance first, this Court would "shift the advantage of time and inertia" back to "the perpetrators of the evil" and away from "its victims," in disregard of the design and structure of the Voting Rights Act. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). The rationale pressed by the RPV and the district court would permit political parties to exclude voters from conventions on the basis of race or require convention goers of one race to pay a fee not imposed on any other participants, as well as to impose other more "subtle" rules that "have the effect of denying citizens their right to vote because of their race." *Id.* at 565.

Affirmance of the district court would flout an unbroken line of this Court's cases stretching back over a half-century to *United States v. Classic*, 313 U.S. 299 (1941), *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, *supra*. These cases recognize that the political parties' nomination processes are an integral step in the general election process and thus implicate the right to vote. When political parties act under authority delegated by the state to determine which candidates may appear on the general election ballot and when they receive preferential access to the general election ballot for the candidates they select, they take on the status of state actors. Their process for making these nominations must therefore comply with constitutional and statutory safeguards of the right to vote. In this case, Virginia has pervasively regulated the RPV's nomination process, substantially delegated state control over the general election

ballot to the RPV, and granted substantial advantages to the RPV.

Section 5 was enacted against this constitutional backdrop and thus reaches the RPV's senatorial nomination process, including its decision to restrict full participation to voters who pay the $45 fee. The language, structure, and legislative history of the Voting Rights Act, as well as consistent administrative and judicial interpretations and congressional ratification of those interpretations, show that section 5 reaches changes with respect to voting effected by political parties acting under delegated state authority.

In this case, the RPV's imposition of the $45 fee falls within the scope of section 5 for three independent reasons. First, the RPV's senatorial nomination process, taken as a whole, falls within the definition of voting set out in section 14(c)(1) of the Act, since the process has both the purpose and the effect of determining the effectiveness of ballots cast in the general election.

Second, by its own terms, the RPV's process involves the *election* of delegates to its nominating convention. The legislative history accompanying the original enactment of sections 5 and 14(c)(1) squarely states that "an election of delegates to a State party convention would be covered by the act." H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464. Since the delegates are elected, restrictions on who can become a delegate are changes with respect to voting within the meaning of this Court's decisions in *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978), *Hadnott v. Amos*, 394 U.S. 358 (1969); and *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

Third, whatever the formal characterization of the RPV's nomination process, the Party in fact permits any registered voter who pledges to support the Party's eventual nominee and who pays $45 to attend the nominating convention and to vote on who should be the Party's standard bearer. The RPV operates a *de facto* primary, albeit one at which all voters assemble together to cast simultaneous ballots. The fact that the Party does not call its process a "primary" can no more immunize it from coverage under section 5 than the fact in *Terry v. Adams* that the Texas Jaybird Association did not call *its* selection mechanism a primary could immunize it from coverage under the Fifteenth Amendment.

In addition to requiring preclearance under section 5 of changes affecting voting, Congress provided, in section 10, a special remedial scheme for voters who have been denied the right to vote by the imposition of a poll tax "or substitute therefor." Section 10 reflects three congressional determinations. First, subsection (a) contains a congressional declaration that the constitutional right to vote is violated by a poll tax. Second, subsection (b) gives authority to the Attorney General to sue to vindicate individual voters' rights that might otherwise go unprotected. And third, subsection (c) grants jurisdiction to three-judge district courts to entertain actions brought under section 10.

The statutory scheme reflects Congress' desire that poll tax claims be litigated before three-judge district courts. Denying individual voters the ability to sue under section 10 would force individuals to bring constitutional claims directly under the Fourteenth and Twenty-Fourth Amendments before a single district judge -- instead of statutory claims under section 10(a) before a three-judge district court. It would force that single judge to reach the constitutionality of a poll tax without addressing the statutory issue first. This result

is directly contrary to the special procedures for adjudicating poll tax claims established by Congress in section 10(c).

The language and structure of the Voting Rights Act reflect Congress' intent to create a private right of action under section 10. Sections 3, 12(f), and 14(f), 42 U.S.C. §§ 1973a, 1973j(f), and 1973*l*(f), all express Congress' assumption that individual citizens possess private rights of action under the Voting Rights Act's various sections. Moreover, an unbroken line of this Court's decisions has recognized private rights of action under various sections of the Voting Rights Act, including under sections 2 and 5, whose language and structure closely parallel section 10. *See, e.g., Allen*, 393 U.S. 544; *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986). And Congress has repeatedly ratified this construction of the Act in amending and extending the Voting Rights Act.

ARGUMENT

I. POLITICAL PARTY NOMINATION PROCESSES COMPRISING AN INTEGRAL PART OF STATE ELECTION MACHINERY CONSTITUTE STATE ACTION RESPECTING THE RIGHT TO VOTE

The right to vote protected by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, cannot be defined in a vacuum. The Act in general, and section 5 in particular, were intended to preserve and extend the constitutional victories against devices such as white primaries and poll taxes that had preceded the Act's passage. The Act also imposed safeguards against circumvention by states *and political parties* that had shown themselves prone "to the extraordinary stratagem of contriving new rules of various

kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach*, 383 U.S. at 335. Thus, the right protected by section 5 must be read against the backdrop of this Court's prior case law.

For more than fifty years, this Court has recognized that party nomination procedures form "an integral part of the procedure for the popular choice of Congressman" and other federal elected officials. *United States v. Classic*, 313 U.S. at 314; *see also Smith v. Allwright*, 321 U.S. at 660; *Terry v. Adams*, 345 U.S. at 469 (Black J.); *id.* at 480-81 (Clark, J.). Accordingly, the Court has held that such nomination activity falls within constitutional protection of the right to vote.

Classic concerned the question whether the predecessors to 18 U.S.C. §§ 241 and 242 -- which protect a citizen's exercise of rights "secured to him by the Constitution" -- permitted the criminal prosecution of election officials who wilfully altered and falsely counted and certified ballots cast in a primary election. The first step in the Court's analysis was to identify the constitutional right at issue. The Court located this right in Art. I, § 2 of the Constitution, which provides that members of the House of Representatives are to be "chosen by the People of the several States."[10] And the Court described the right as the "right to vote for a representative in Congress *at the general election*," *Classic*, 313 U.S. at 313 (emphasis added).

Classic held that this right was implicated in the primary

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[10] The counterpart for Senatorial elections is even more explicit: "The Senate of the United States shall be composed of two Senators from each State, *elected* by the people thereof ...." U.S. Const., amend. XVII (emphasis added).

election, not because voters in a primary election cast ballots in voting booths, but because, under Louisiana law, the primary operated as a constitutive "step in the exercise by the people of their choice of representatives in Congress." *Id.* at 317.[11] Louisiana law "restricted" voters' choice in the constitutionally protected election to candidates nominated by primary, to candidates who filed candidacy statements, and to lawful write-in candidates. *Id.* at 313. State law had thus converted "the mode of [constitutionally protected] choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election." *Id.* at 316-17. "The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana is thus the right to participate in that choice." *Id.* at 314.

In explaining why the Democratic primary effectively "operate[d] to deprive the voter of his constitutional right of choice" at the general election, *id.* at 319, *Classic* expressly relied on Justice Pitney's concurring opinion in *Newberry v. United States*, 256 U.S. 232 (1921).[12] There, Justice Pitney

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11 The appellees apparently understood the functional equivalence of various nominating devices since they argued that "[a] nominating primary is not an election any more than the nominating convention, or its predecessor the caucus, is an 'election.'" 313 U.S. at 306.

12 *Newberry* had reversed a number of convictions obtained under the Federal Corrupt Practices Act for illegal expenditures within the primary process. Justice McReynolds's opinion for the Court was based on the proposition that Art. I, § 4 gave Congress no regulatory authority over primary elections. Justice McKenna, who provided Justice McReynolds's opinion with a necessary fifth vote, rested his support on the fact that the statute had been enacted prior to the Seventeenth Amendment (which required popular election of senators); he left open the possibility that Congress might have the power under that amendment to regulate senatorial primaries. *See* 256 U.S. at 258. Chief Justice White, *see* 256 U.S. at 275, and Justice Pitney, joined by Justices Brandeis and Clarke, concurred in the reversal of the convictions because they found prejudicial trial error. They dissented, however, from the Court's constitutional holding, because they believed Congress did have the power to regulate primary elections.

explained that:

> "It seems to me too clear for discussion that primary elections *and nominating conventions* are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government that power to regulate them is within the general authority of Congress.... As a practical matter, the ultimate choice of the voters is predetermined when the nominations have been made. Hence, the authority of Congress to regulate the primary elections *and nominating conventions* arises, of necessity, not from any indefinite or implied grant of power but from one clearly expressed in the Constitution itself (Art. I, § 8, cl. 18 [the Necessary and Proper Clause]) ....

Id. at 285-86 (emphasis added). *See Classic*, 313 U.S. at 319 (citing this part of Justice Pitney's opinion).

Finally, *Classic* explained the necessity for constitutional protection of the nomination process by stating that "[u]nless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection." *Id.* at 319.

Smith v. Allwright extended *Classic*'s analysis from Art.

I, § 2 to the Fifteenth Amendment's prohibition against racial discrimination in voting. The Texas Democratic Party operated a primary limited to white registered voters. The Court held that this restriction violated the Fifteenth Amendment. Again, the Court's focus was not directed at what happened within the primary itself -- "[t]he privilege of membership in a party may be, as this Court said in Grovey v. Townsend, 295 U.S. 45, 55, no concern of a State," *Smith*, 321 U.S. at 664 -- but rather at the relationship between the nomination process and the general election. Once again, it was the "unitary character of the electoral process," and the primary's status as "an integral part of the election machinery," *Smith*, 321 U.S. at 661, 660, that transformed the party's venture into state action. "If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot," *id.* at 664, then "state delegation to a party of the power to fix the qualifications of primary elections," that is, the persons who perform the state-created nominating function, "is delegation of a state function that may make the party's action the action of the State." *Id.* at 660. It was not simply the fact that voters went into booths and cast ballots that rendered the Democratic Party's nomination process state action; Texas apparently required ratification of the primary results by a party's state convention before they were certified to the Secretary of State for placement on the ballot, *see Smith*, 321 U.S. at 653 n. 6 & 663; *Dickson v. Strickland*, 265 S.W. 1012, 1013 (Tex. 1924).

Terry v. Adams makes clear that nomination activity by political organizations is covered by the Fifteenth Amendment even when it does not involve a formal primary election. In *Terry*, the challenged activity was *antecedent to*

the formal party primary, *see* 345 U.S. at 463 (Black, J.), but the Court nonetheless found that the exclusion of blacks from this pre-primary activity violated the Fifteenth Amendment.

Justice Clark's opinion for himself and three other Justices observed that "[a]n old pattern in new guise is revealed by the record... In earlier years, the members at mass meetings determined their choice of candidates to support at forthcoming official elections. Subsequently the Association developed a system closely paralleling the structure of the Democratic Party." 345 U.S. at 480 (Clark, J.). Nothing in Justice Clark's opinion suggested it was the change in method that brought the Jaybirds under constitutional constraint. Indeed, the practice of *vive voce*, or oral, voting was a traditional American device. *See* G. Edward White, *Reading the Guarantee Clause*, 65 U. Colo. L. Rev. 787, 796-97 (1994).

Justice Clark identified the prohibited state action thus:

> "[W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."

345 U.S. at 484. Similarly, Justice Black, for himself and three other Justices, found that the Fifteenth Amendment was implicated because "[t]he Jaybird primary has become an integral part ... of the elective process that determines who

shall rule and govern in the county." *Id.* at 469 (Black, J.).[13]

Taken together, then, *Classic*, *Smith*, and *Terry* squarely establish the principle that party nomination activities that are regulated by the state and that essentially shape the general election ballot for public offices form an integral part of the right to vote. When a state delegates to private organizations like the RPV the critical electoral function of "winnow[ing]" the field of potential candidates down to a manageable few for the general election ballot, *see Storer v. Brown*, 415 U.S. 724, 735 (1974), then the party's activities in that context become state action affecting the right to vote. It follows that the party's decisions about the winnowing process become subject to regulation under both constitutional provisions such as Article I and the Fourteenth and Fifteenth Amendments and congressional statutes intended to enforce those constitutional rights.

II. THE RPV'S CHANGE IN THE RULES GOVERNING WHO COULD PARTICIPATE IN SELECTING THE PARTY'S CANDIDATE FOR UNITED STATES SENATOR REQUIRED PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The Voting Rights Act was enacted against the backdrop of political parties' intimate involvement in the electoral process. Section 14 (c)(1) of the Act, which defines the

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13 That *Smith* and *Terry* concerned one-party jurisdictions was not essential to their holdings: as *Classic* explained, the right to participate is protected even if the party primary "invariably, sometimes or never determines the ultimate choice of the representative." 313 U.S. at 318.

terms "vote" and "voting," was expressly amended to reach party practices related to nominating conventions. As Rep. Jonathan B. Bingham, the author of the amendment that expanded section 14(c)(1) to cover elections to "party office," explained on the floor of the House:

> I recommended the addition of language which would extend the protections of the bill to the type of situation which arose last year when the regular Democratic delegation from Mississippi to the Democratic National Convention was chosen through a series of Party caucuses and conventions from which Negroes were excluded.

111 Cong. Rec. 16273 (July 9, 1965). *See also Perkins v. Matthews*, 400 U.S. 379, 389 (1970) (quoting the observation of the executive director of the Civil Rights Commission during the 1969 hearings on the extension of the Voting Rights Act that "State legislatures *and political party committees* in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters"). Accordingly, Congress intended to require preclearance under section 5 of party rules that limited the eligibility of voters to participate in the nomination process.

The language, structure, and legislative history of the Voting Rights Act all demonstrate that the Act was intended to reach the parties' performance of the state-delegated public electoral functions of nominating candidates for federal office. Moreover, the consistent administrative interpretation of section 5, to which this Court has traditionally accorded substantial weight, has also concluded that section 5 applies to party nomination processes. With one inapposite exception, the case law reaches the same result.

Affirmance of the district court's decision to exempt the RPV from the obligation to preclear its imposition of a fee to participate in its nomination process would flout three decades of Voting Rights Act case law and would require this Court implicitly to overrule the understanding of the right to vote established in *Classic*, *Smith v. Allwright*, and *Terry*. This Court should instead hold that section 5 reaches all changes in eligibility to participate in the electoral process, whether the state enacts those changes directly or instead permits private groups to whom it has delegated the nominating function to make them.

A. *The text and legislative history of section 5 show Congress' intent to cover the nomination activities of political parties, including conventions*

Section 5 of the Voting Rights Act reaches "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c. The Voting Rights Act was enacted to enforce the Fifteenth Amendment to the Constitution, *see* Pub. L. 89-110, 79 Stat. 437 (and amended and extended to enforce the Fourteenth Amendment as well, *see* S. Rep. No. 97-417, p. 40 n. 152 (1982)). Its understanding of what the right to vote means is at least as broad as those Amendments', which, as we have seen, comprehends coverage of the right to participate fully in the party nomination process as well as in the general election. *See United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 117 (1978) ("[t]he language, structure, history, and purposes of the Act persuade us that § 5, like the constitutional provisions it is designed to implement, applies to all entities having power over any aspect of the electoral process within designated jurisdictions").

That Congress intended the right protected by the Act to have this meaning is clear from the Act's definitional provision:

> "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, *but not limited to*, registration, ... casting a ballot, and having that ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or *party office*."

Voting Rights Act, § 14(c)(1), 42 U.S.C. § 1973*l* (c)(1) (emphasis added). Thus, by its very terms, the Act reaches beyond the formal action of casting a ballot. If voting in the general election is profoundly shaped by the outcome of the party nomination process, then the vote of an individual who has been excluded from that stage will not be as effective as if the voter had had the right to participate fully.

This realism about the electoral process underlies Congress' flat declaration that the definition of the right to vote provided in section 14(c)(1) reaches party nominating conventions: "an election of delegates to a State party convention would be covered by the act." H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464; *see also* 111 Cong. Rec. 16273 (July 9, 1965) (the inclusion of "party office" within § 14(c)(1) "extend[s] the protections of the bill to ... [delegates] chosen through a series of Party caucuses and conventions").

The scope of section 5 is confirmed by the language of

section 2, which is intended to work in tandem with it.[14] Section 2 provides that voting practices or procedures "result in a denial of the right ... to vote" when "the political processes leading to nomination or election" are not equally open to all voters. 42 U.S.C. § 1973(a), (b). This phrase also acknowledges the centrality of the nomination process, whatever its form, as the legislative history's reference to the salience of "candidate slating process[es]" shows. *See* S. Rep. No. 97-417 at 29; *White v. Regester*, 412 U.S. 755, 766-67 (1973).

In this case, the RPV's behavior falls well within the scope of section 5. The Commonwealth of Virginia has delegated to the RPV a major share of the function of "winnow[ing]" the general election ballot down to a few serious candidates, *Storer*, 415 U.S. at 735, and in return provides the Party with an automatic spot on the general election ballot. The Commonwealth substantially regulates the RPV's performance of this function, determining when

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14 *See* H.R. Rep. No. 97-227, 97th Cong., 1st Sess., p. 28 (1982) ("Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under section 2] or preclearance [under section 5]"). This Court has consistently construed section 5 to be at least as broad as section 2. *See Chisom v. Roemer*, 111 S.Ct. 2354, 2367 (1991). The recent decision in *Holder v. Hall*, 62 U.S.L.W. 4728 (1994), is not to the contrary. First, there was no opinion for the Court. Second, the clear import of Justice Kennedy's and Justice O'Connor's opinions is that section 5 is, if anything, *broader* in its scope than section 2. *See Holder*, 62 U.S.L.W. at 4731 (Kennedy, J.) (suggesting that the requirement of preclearance under section 5 does not necessarily mean a practice is also vulnerable to attack under section 2); *id.* at 4732 (O'Connor, J., concurring in part and concurring in the judgment) (stating that whether a section 2 dilution claim may be brought raises "more difficult questions" than whether a practice marks a change with respect to voting under section 5); *cf. id.* at 4750 (Blackmun, J., dissenting) (stating that the scope of section 2 and section 5 is identical).

the RPV is free to use a nominating convention and when a public official can instead compel the Party to use a primary; the Commonwealth has also set a series of parameters within which any nominating convention must be conducted. In light of these circumstances, the RPV's activities are state action that substantially determine the effectiveness of votes cast in the general election.

Clearly, if the Commonwealth of Virginia had itself enacted a statute commanding that only voters who paid a tax of $45 could participate in the RPV's nomination process -- or if the Commonwealth had instead required voters to pay such an exaction to the Party -- that statute would fall within the language of section 5 and require preclearance. If that is so, then the RPV, as the delegee of the Commonwealth's power, is equally covered. The RPV exercises state-delegated power to determine who gains automatic placement on the general election ballot. This feature, standing alone, requires that the Party seek preclearance of changes in whom it permits to participate in exercising that power.

This conclusion is even clearer given the Party's own recognition that its convention is intended to affect voting in the general election. The Party limits the right to participate in its nominating convention to voters who are willing if requested to declare "their intent to support all of its nominees for public office in the ensuing election," J.A. 29, 61. A voter who both wishes to participate in the convention and to comply with his or her declaration has clearly had his or her right to vote affected by the RPV's process.

In addition, the Party's own description of its nomination process recognizes that it involves the right to vote. The Party's Plan of Organization -- its governing

document[15] -- requires that participants at the state party nominating convention be "*elected*" at mass meetings, party canvasses, or local conventions (emphasis added). *See, e.g.*, RPV Party Plan, Art. II, ¶ 22 (J.A. 32); Art. VIII, § A, ¶ 3 (mandating that any prefiling requirement required "for any *election* by a Mass Meeting, Party Canvass, or Convention" be included in the call for that meeting) (J.A. 52) (emphasis added); Art. VIII, § H,¶ 4 (authorizing "the Mass Meeting, Party Canvass, *or* [local] Convention *electing* the delegates" to a state convention to instruct its delegation on specific issues) (J.A. 56) (emphasis added). *See also* Affidavit of David S. Johnson (Executive Director of the RPV), ¶ 5 (J.A. 23). By its own terms, then, the RPV's process involves the election of delegates to a state convention, precisely the behavior that Congress declared in section 14(c)(1)'s definitional provision that the Voting Rights Act was intended to reach.

B. *The RPV's activities fall squarely within the Attorney General's interpretation of the scope of section 5*

The Attorney General, whose long-standing administrative interpretation of section 5 is entitled to "considerable deference," see, e.g., *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178-79; *Dougherty County*, 439 U.S. at 39; *United States v. Sheffield County Board of Commissioners*, 435 U.S. at 131, has consistently construed section 5 to reach political party rules relating to the candidate nomination process. Under 28 C.F.R. § 51.7 (1994), "[a] change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the

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15 *See* J.A. 22.

change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction" such as Virginia. The Attorney General has repeatedly interposed objections to party rules when he has been unable to conclude that the rules had neither a discriminatory purpose nor a discriminatory effect. *See* Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 1st Sess. 2264, 2271 (1981) (appendix to letter from James P. Turner, Acting Assistant Attorney General in charge of the Civil Rights Division, reporting on section 5 objections interposed to changes with regard to primary elections and conventions) [hereafter "Turner Appendix"].

The conditions set by § 51.7 are clearly satisfied in this case. The challenged fee has repeatedly been raised without preclearance ever having been obtained. J.A. 18. It is being imposed on persons who wish to participate in the RPV's "public electoral function" of designating a senatorial candidate to appear on the general election ballot. And the RPV is acting under the express authority granted by Va. Code §§ 24.2-509 to 511 in holding a convention to nominate that candidate. The RPV thus must seek preclearance of any changes in its practices under this delegated authority. *See United States v. Sheffield Board of Commissioners*, 435 U.S. at 136; 51 C.F.R. §§ 51.14, 51.15 (1994).

Accordingly, under § 51.23(b), an "appropriate official" of the RPV was required to seek preclearance of the Party's

decision to impose the fee on individuals who wished to participate fully in the nomination of the Party's candidate for United States Senate.[16]

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[16] The promulgation of § 51.23(b) cures the deficiency that led the district court in *Williams v. Democratic Party of Georgia*, No. 16286 (N.D. Ga. April 6, 1972), *summarily aff'd*, 409 U.S. 809 (1972), to refuse to require preclearance of the Georgia Democratic Party's rules for electing delegates to the Democratic National Convention. The party rule at issue provided that delegates would be elected at open conventions in each of Georgia congressional districts at which "any resident ... who subscribed to the principles of the Democratic Party" could participate. Slip op. at 2.

The district court in *Williams* was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard," slip op. at 4, for precisely the reasons that we have set out above. But the *Williams* court reluctantly concluded, in "the absence of any procedure for submitting changes in party rules under Section 5," that section 5 preclearance could not be required since "[t]he State Party cannot force the State to seek approval for the party's rules and regulations." Slip op. at 5. It was "under *these* circumstances" that *Williams* concluded that section 5 did not apply. Slip op. at 6 (emphasis added). Subsequently, the Attorney General created the submission mechanism of § 51.23(b), which eliminates the entire rationale for *Williams'* holding, and district courts that have subsequently addressed the issue have required preclearance of internal party rules even when those rules do not involve primaries. *See, e.g., Hawthorne v. Baker*, 750 F. Supp. 1090 (M.D. Ala. 1990) (three-judge court) (requiring preclearance of internal Alabama Democratic Party rules eliminating the right of certain organizations *to appoint* members of state and county party committees); *Fortune v. Kings County Democratic County Committee*, 598 F. Supp. 761, 765 (E.D.N.Y. 1984) (three-judge court) (finding that the defendant was performing a "public electoral function" in deciding who would appear on the general election ballot and thus requiring preclearance of a party rule permitting committee members *who had been appointed* to participate in decisions to fill vacancies in nominations for public office -- e.g., when a candidate died after being nominated).

In any event, this Court having noted probable jurisdiction, the summary affirmance in *Williams* carries little precedential weight. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 120-21 (1986); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

C. *Preclearance of the RPV's decision to hold a nominating convention and to limit delegate eligibility to persons who paid a filing fee is compelled by this Court's decisions in* Presley v. Etowah County Commission, Dougherty County Board of Education v. White, *and* Allen v. State Board of Elections

In *Presley v. Etowah County Commission*, 502 U.S. at 502, 509 (emphasis added), this Court reiterated "[t]he principle that § 5 covers voting changes over a wide range" and "reaffirm[ed] ... that *every* change in rules governing voting must be precleared." *See also Dougherty County Board of Education v. White*, 439 U.S. at 38; *NAACP v. Hampton County Election Commission*, 470 U.S. at 176; *United States v. Sheffield Board of Commissioners*, 435 U.S. at 122; *Allen v. State Board of Elections*, 393 U.S. at 567.

Presley identified four categories of changes subject to preclearance:

> First, we have held that § 5 applies to cases like *Allen v. State Board of Elections* itself, in which the changes involved the manner of voting.... Second, we have held that § 5 applies to cases like *Whitley v. Williams*, which involve candidacy requirements and qualifications. See *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985) (change in filing deadline); *Hadnott v. Amos*, 394 U.S. 358 (1969) (same); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32 (1978) (rule requiring board of education members to take unpaid leave of absence while campaigning for office). Third, we have applied § 5 to cases like *Fairley v. Patterson*, which concerned changes in the composition of the electorate that may vote for

> candidates for a given office.... Fourth, we have made clear that § 5 applies to changes, like the one in *Bunton v. Patterson*, affecting the creation or abolition of an elective office.

Presley, 502 U.S. at 501.[17] The last three of these "four typologies," *id.* at 502 are all implicated in this case.

First, according to the RPV's own characterization of the $45 delegate filing fee, the fee falls squarely within the category of "candidacy requirements and qualifications." *Dougherty County Board of Education v. White*, 439 U.S. at 41-43, held that section 5 covers changes in the qualifications required for candidates for public office. In particular, a decision to impose, or raise, filing fees is a change requiring preclearance. *See id.* at 40-41; *see also* H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 18 (1981) (identifying filing fees as a part of the electoral process covered by § 5); Turner Appendix at 2252, 2253, 2256 (reporting Department of Justice objections under § 5 to filing fees). *Cf. Bullock v. Carter*, 405 U.S. 134, 144 (1972) (filing fees can restrict the field of candidates and thus "ten[d] to deny some voters the opportunity to vote for a candidate of their choosing").

By its express terms, the Voting Rights Act applies to candidates for "party office," like convention delegates, as well as to public offices. Voting Rights Act § 14(c)(1). The RPV's Plan of Organization expressly provides that delegates to the nominating convention be "*elected*" at mass meetings, party canvasses, or local conventions. *See supra* p. 26. By its own terms, then, the RPV's process involves the election of delegates to a state convention, precisely the behavior that Congress declared 14(c)(1) was intended to reach. And by

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17 *Whitley*, *Fairley*, and *Bunton* were the three companion cases decided along with *Allen*.

limiting the pool of delegates to those voters willing and able to pay $45, the RPV has certainly imposed a qualification analogous to the qualification at issue in *Dougherty County Board of Education*. Similarly, the Party's promulgation of a deadline for filing as a delegate brings this case within the analysis of *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985), and *Hadnott v. Amos*, 394 U.S. 358 (1969).

Second, despite the RPV's characterization of the $45 fee as a delegate filing fee, the fee actually changes "the composition of the electorate that may vote for candidates for a given office." As we have already explained, the RPV in reality allows any voter who pays the $45 fee to attend the convention and cast a vote on whom the Party should nominate. The fee, however, excludes from the electorate -- both directly at the convention and indirectly under the analysis laid out in *Classic*, *Smith* and *Terry* at the general election -- individuals who are unwilling or unable to pay the fee.

Third, the RPV's decision not to hold a primary, but rather to hold a nominating convention and impose a $45 fee to participate fully, involved the "abolition of an elective office." In 1990, the Party decided to conduct a primary to determine its nominee for United States Senator. Under Virginia law, that primary would have been open to all voters. *See* Va. Code § 24.2-530. No voter would have been required to pay a fee to participate. Nor would a voter have had to travel to, or incur the expenses of, a weekend-long convention in order to have his or her say in the choice of nominee. In 1994, by contrast, the Party abolished the primary election to fill the position of Republican nominee for United States Senator. Thus, the RPV's decision falls within the category identified in *Bunton*. *See also* 28 C.F.R. § 51.13(i).

D. *Because the RPV convention operates as a* de facto *or functional equivalent of a political primary, rules regarding who can participate in the convention are covered by section 5*

Finally, as a *de facto* matter, the RPV's convention itself involved voting. As the RPV's process actually operated, every voter who was willing to pledge his or her support to the Party's nominee and to pay the filing fee was entitled to be certified as a "delegate." Every voter who showed up at the convention was entitled to vote for the candidate of his or her choice. The "filing fee" was simply the cost of voting -- the functional equivalent of a poll tax. The county caucuses were a simple pass-through to the state convention. Under these circumstances, the imposition of the $45 fee as a precondition to casting a vote for a nominee for public office constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

Voting at the Republican state convention was not like voting in a private club or voting for members of the All-Star team, *see Chisom v. Roemer*, 111 S.Ct. at 2372 (Scalia, J., dissenting). Instead, it was in every respect part of the electoral process regulated by the Voting Rights Act. Whatever the formal nature of the RPV's nominating process, the Party in fact conducted the functional equivalent of a primary, as appellants alleged in their complaint, J.A. 6. *See also* Atkinson, *supra* at 343 (describing the RPV's 1978 senatorial nominating convention as a "great indoor primary"); *cf. Allen v. State Board of Elections*, 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part) (concluding that "since the Voting Rights Act explicitly covers 'primary' elections" and the petition process for independent candidates was "the functional equivalent of the political primary" it too should be covered by section 5).

The RPV's decision to call its selection mechanism a "convention" rather than a "primary" is no different from the decision of the Texas Jaybirds in *Terry* not to call their nomination process a "primary." *Terry* establishes that the constitutional guarantee of equality in voting cannot be evaded by verbal quibbling over what a party calls its nominating event.

III. AFFIRMANCE OF THE DISTRICT COURT'S DECISION WOULD RESURRECT PRECISELY THE DANGERS THAT MOTIVATED PASSAGE OF SECTION 5

As this Court explained in *McCain v. Lybrand*, 465 U.S. 236 (1984):

> "The Voting Rights Act ... was enacted by Congress as a response to the unremitting and ingenious defiance of the command of the Fifteenth Amendment for nearly a century by state officials in certain parts of the Nation. Congress concluded that case-by-case litigation ... was an unsatisfactory method to uncover and remedy the systematic discriminatory election practices in certain areas: such lawsuits were too onerous and ... even successful lawsuits too often merely resulted in a change in methods of discrimination. Congress decided to shift the advantage of time and inertia from the perpetrators of the evil to its victims, and enacted stringent new remedies designed to banish the blight of racial discrimination in voting once and for all."

Id. at 243-44 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

The rationale advanced by the RPV and subscribed to by the district court would create a huge loophole in the fabric of section 5. It would enable states to circumvent the Act's guarantees by turning over control of the process to private parties, in clear contradiction of the holdings of *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948), and *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949), on which Justice Black relied in *Terry v. Adams*. *See* 345 U.S. at 465-66. *See United States v. Sheffield Board of Commissioners*, 435 U.S. at 125 (rejecting the argument that cities within a covered state were not required to submit electoral changes if they did not themselves perform voter registration activities because that "would invite States to circumvent the Act ... by allowing local entities that do not conduct voter registration to control critical aspects of the electoral process. The clear consequence of this interpretation would be to nullify both § 5 and the Act in a large number of its potential applications"); *cf. Lebron v. National Railroad Passenger Corp.*, No. 93-1525, slip op. at ___ (Feb. 21, 1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson*, 163 U.S. 537 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak.").

The change being challenged in this case provides a signal example of how the decision of the district court would undercut the key constitutional and statutory protections that section 5 is intended to safeguard. Since 1965, the RPV has increased the fee for participating in its nomination process to $45 -- a charge far higher, even in constant dollar terms, than the $1.50 Virginia poll tax that the Twenty-Fourth Amendment, section 10 of the Voting Rights Act, and *Harper* struck down. Congress' war against the poll tax was

intended to combat several injustices:

> One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise....The poll tax was also attacked as a vehicle for fraud which could be manipulated by political machines by financing block payments of the tax. In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner.

Forssenius, 380 U.S. at 539-40. The revival of each of those injustices is threatened by the decision of the district court.

First, the $45 fee clearly exacts a price on citizens who wish to participate fully in the franchise. Moreover, that price is so high that many voters may be deterred from participating at all. *See* J.A. 9.

Second, the existence of the fee may give rise to vote buying efforts by candidates who pay the fee for voters who agree to support them at the convention. The Oliver North for U.S. Senate Committee engaged in precisely this kind of behavior. *See* J.A. 7-8. *Cf.* Frederic D. Ogden, The Poll Tax in the South 3 n.5, 49-50, 92-95 (1958) (discussing the longstanding Virginia practice of candidates' block payment of the poll taxes of their supporters).

Third, the district court's decision in this case would give a political party *carte blanche* to discriminate within its nomination process. As long as it called its process a "convention," a party could impose fees on citizens who wished to participate, even if the purpose or effect was to deny nonwhite citizens an opportunity to participate. Even facially discriminatory measures -- like requiring blacks to

pay higher fees than whites -- would be exempt from the preclearance process. *Cf. Baskin v. Brown*, 174 F.2d at 392 (one of the discriminatory devices the South Carolina Democratic Party imposed after *Rice v. Elmore* required the party to allow blacks to participate was that "Negroes desiring to vote in the [newly privatized] primaries were required, in addition, to present general election certificates, a requirement not exacted of white voters").

But the potential discriminatory sweep of the district court's exemption of conventions from the Voting Rights Act is even broader. A party could restrict attendance at mass meetings to individuals who own their own homes, even though this might discriminate against minority group members in areas where they are more likely to live in apartments. Similarly, a party could require delegates to its convention to have college degrees even if that would effectively bar members of minority groups from attending. Even overt exclusion -- a rule, for example, barring blacks from serving as delegates -- would elude the preclearance process.

Such absurd and unacceptable results would flout Congress' justifiable determination, in jurisdictions such as Virginia, "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. at 328. Excluded voters would be obligated to bring costly and time-consuming constitutional challenges, and the Department of Justice would be unable to protect voters' rights directly by denying the Party preclearance. Requiring the victims to bring suit to stop such clearly discriminatory practices related to voting would undermine the central purpose of section 5.

IV. Individuals subjected to an illegal poll tax can sue under section 10 of the Voting Rights Act

The enactment of section 10 of the Voting Rights Act of 1965 was neatly bracketed by two decisions by this Court striking down Virginia's use of a poll tax or a "substitute" therefor. *Harman v. Forssenius*, 380 U.S. at 542; *Harper v. State Board of Elections*, *supra*. *Forssenius* squarely confirmed the right of individual citizens to challenge poll taxes directly under the Constitution. 380 U.S. at 533 n. 6.[18] And *Harper* held that such poll taxes violate the Fourteenth Amendment. Section 10 of the Voting Rights Act simply restates the constitutional ban and lays out a procedure for vindicating the constitutional right. A private right of action follows from the language, structure, and legislative history of the Act and an unbroken series of decisions by this Court recognizing individual voters' ability to sue under the Voting Rights Act. Denying a private right of action under section 10 would succeed only in subverting the special procedures in that section for enforcing constitutional rights.

A. *Section 10 reflects Congress' decision to create special procedures for vindicating the constitutional rights declared in section 10(a)*

Section 10 accomplishes three different objects in its three subsections: subsection (a) is a congressional declaration that the constitutional right to vote is violated by a poll tax; subsection (b) gives authority to the Attorney

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[18] Appellants' claims under the Fourteenth and Twenty-Fourth Amendments are currently pending before a single-judge court. *See* J.A. 2-3.

General to sue for declaratory or injunctive relief against a poll tax "or substitute therefor";[19] and subsection (c) grants jurisdiction to three-judge district courts to entertain such actions.

The only consequence of denying a private right of action under section 10 would be to force private citizens to sue directly under the Fourteenth and Twenty-Fourth Amendments. Yet this Court has repeatedly held that when Congress has provided meaningful remedies for the violation of constitutional rights, private individuals must take advantage of those remedies instead of suing directly under the Constitution. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). Denying a private remedy under section 10 would force individuals to bring constitutional claims before a single district judge -- instead of statutory claims before a three-judge district court. It would force that single judge to reach the constitutionality of a poll tax without addressing the statutory issue first.[20] This result is directly contrary to the special procedures for adjudicating poll tax claims established by Congress in section 10.

Section 10(c) establishes a distinctive procedure for

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19 This language echoes the Court's concern in *Forssenius* that states like Virginia would circumvent the Twenty-Fourth Amendment's ban on poll taxes by using "substitutes." *See Forssenius*, 380 U.S. at 542 (under the Twenty-Fourth Amendment, "[f]or federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed").

20 *Cf. City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion) (suggesting that "general principles of judicial administration" require addressing a voter's statutory claim under the Voting Rights Act before addressing his constitutional claims even though section 2, as it then existed, "add[ed] nothing" to the plaintiffs' constitutional claim).

enforcement through adjudication by a three-judge district court. In addition to finding an implied private right of action in *Allen*, this Court also held that private actions under section 5, like public actions under that section, had to be heard before a three-judge district court. 393 U.S. at 561-63. The same is true of actions under section 10. Despite the burden that three-judge district courts placed on the federal judiciary, this Court deferred in *Allen* to the congressional judgment that such courts were "desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration." *Id.* at 561-62. Congress intended three-judge district courts to protect the states, and those acting on their behalf, from the variable decisions of single district judges acting alone. Exactly the same congressional judgment, based on exactly the same concerns, applies to claims under section 10 as to claims under section 5.

If anything, the force of the congressional judgment to require three-judge courts is stronger today than when *Allen* was decided. Most of the provisions for three-judge district courts have since been repealed. *See* Pub. L. 94-381, 90 Stat. 1119 (1976). Claims under section 10 (and other sections) of the Voting Rights Act, however, were specifically exempted from this repeal. H.R. Rep. No. 94-1379, 94th Cong. 2d Sess. 4 (1976); S. Rep. 94-204, 94th Cong. 1st Sess. 9 (1975). To require poll tax claims to be brought by private individuals only before a single judge would therefore contradict a judgment that Congress has made at least twice in favor of three-judge district courts.

This step would also leave the single federal judge without the possibility of avoiding a constitutional decision by relying on statutory grounds. Section 10(b) does not provide for relief that differs significantly from the equitable relief

sought in an individual action under the Constitution. It does, however, reach any claim against a poll tax "or substitute therefor," a phrase which arguably includes required payments such as the registration fee in this case. It makes no sense to construe section 10 so that a single judge must reach a constitutional question when a court of three judges, required by Congress, could decide a case on statutory grounds.

B. *The language and structure of the Voting Rights Act reflect Congress' intent to create a private right of action under section 10*

Section 10 was enacted in 1965, soon after ratification of the Twenty-Fourth Amendment, which prohibits poll taxes in federal elections. Subsection (a) enforces this prohibition and extends it to poll taxes in state elections, an extension that anticipated the decision in *Harper*, which held that all poll taxes violate the Fourteenth Amendment. 383 U.S. at 666.

Section 10 declares that poll taxes are unconstitutional because "the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting." This declaration gives rise, of its own force, to the limited private right of action asserted by the plaintiffs in this case. If this right means anything at all, it means that private individuals are entitled to bring an action to declare a poll tax illegal, to enjoin its continued use, and to obtain a refund of any poll taxes illegally imposed.

By declaring that poll taxes are unconstitutional, section 10(a) makes poll taxes void and thus subject to the usual remedies for void enactments. In *Transamerica Mortgage*

Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), a similar statutory declaration was held to support a claim for limited equitable relief. Section 215 of the Investment Advisers Act of 1940 declares that contracts made or to be performed in violation of the Act are "void" as regards the violator and knowing successors in interest. 15 U.S.C. § 80b-15 (1988). Relying solely on this provision, this Court held that "[a] person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid." *Id.* at 18. What is true of a contract declared void by Congress must also be true of a poll tax declared unconstitutional by Congress. Both are void and both support actions by individual victims for limited equitable relief and restitution. That is all the plaintiffs seek in this case.

The structure of the Voting Rights Act shows that Congress assumed the existence of implied private rights of action under its provisions. Section 12(f), 42 U.S.C. § 1973j(f), grants federal district courts jurisdiction over actions to enforce the statute "without regard to whether *a person* asserting rights under the provisions of subchapte[r] I-A [which includes section 10] ... shall have exhausted any administrative or other remedies that may be provided by law." (Emphasis added.) This language is far broader than would have been necessary to cover the Attorney General, who, in any event, faces no need to exhaust administrative remedies.

So, too, section 3, 42 U.S.C. § 1973a, explicitly recognizes that private individuals can sue under the Voting Rights Act to enforce their constitutional rights. The three subsections of section 3 authorize a variety of remedies in cases where "the Attorney General *or an aggrieved person* institutes a proceeding under *any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment*," 42

U.S.C. § 1973a(b) (emphasis added); *accord*, 42 U.S.C. §§ 1973a(a), 1973a(c). Section 10 is clearly such a statute, since it rests directly on the fourteenth and fifteenth amendments. *See* 42 U.S.C. § 1973h(a), (b).

Moreover, the legislative history of section 3 clearly reveals that Congress intended to confirm the existence of implied private actions under the Voting Rights Act. As originally enacted, section 3 provided for special procedures in statutory actions commenced by "the Attorney General." Pub. L. 89-110, § 3, 79 Stat. 437 (1965). In 1975, this phrase was amended to read "the Attorney General or an aggrieved person" to take account of implied private rights of action under the Act, first upheld by this Court in *Allen*. *See Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989). The Senate Report accompanying the 1975 amendment is absolutely clear. Section 3 was amended

> to afford to private parties the same remedies which section 3 now afforded only to the Attorney General.... An "aggrieved person" is any person injured by an act of discrimination. It may be an individual or an organization representing the interests of injured person. In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights.

S. Rep. No. 94-295, 94th Cong., 1st Sess. 39-40 (1975).

In section 14(f), 42 U.S.C. § 1973*l*(e), Congress again recognized that private individuals can sue under the same statutory provisions as the Attorney General. Congress provided for the award of attorney's fees to "the prevailing party, other than the United States," in any action "to enforce the voting guarantees of the fourteenth or fifteenth amendment." This provision squarely recognizes the right of private individuals to sue under statutory provisions, like section 10, designed to secure constitutional rights under the Fourteenth and Fifteenth Amendments. And, again, just like the current version of section 3, section 14(f) was added to the statute in 1975. Pub. L. 94-73, § 402, 89 Stat. 404 (1975). Its stated purpose was to encourage actions under the Act by private individuals:

> Such a provision is appropriate in voting rights cases because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights.

S. Rep. 94-295, 94th Cong., 1st Sess. 40 (1975). Just as the Attorney General can sue to enforce voting rights under section 10, but without recovery of attorney's fees, the private individuals who hold those rights can bring suit as well.

C. *An unbroken line of this Court's decisions has found implied private rights of action under the Voting Rights Act*

Soon after enactment of the Voting Rights Act, this Court found an implied private right of action under section 5 of the Act in *Allen*. Section 5, like section 10, explicitly refers only to actions by the Attorney General, yet this Court found an implied private right of action to enjoin changes in voting procedures that had not been precleared with the Attorney General. The reasons grounding that decision have the same force here.

First, *Allen* noted the language in section 5 providing that "no person" should be denied the right to vote by a provision that has not been precleared. 393 U.S. at 555. "Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment" that section 5 preclearance is required. *Id.* Similarly, section 10(a) declares that "the constitutional right of citizens to vote is denied or abridged" by a poll tax.

Second, *Allen* noted that section 12(f) of the Act grants jurisdiction over suits under the Act to district courts "without regard to whether a person asserting rights under the provisions of this Act" has exhausted administrative remedies. 393 U.S. at 555 n.18. Read in tandem with the general voting rights jurisdictional provision, 28 U.S.C. § 1343, the Court suggested that section 12(f) "might be viewed as authorizing private actions." 393 U.S. at 555 n.18. This reasoning applies with equal force to section 10.

Third, *Allen* explained that the Voting Rights Act's specific authorization of suits by the Attorney General was included "to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights."

393 U.S. at 555 n.18. That is clearly true of section 10(b). Nothing in section 10(b) even remotely suggests that Congress intended to make the Attorney General the sole enforcer of a prohibition on poll taxes. On the contrary, section 10(b) itself relies on the power of Congress to enforce the Fourteenth, Fifteenth, and Twenty-Fourth Amendments, all of which refer in their substantive provisions to the rights of "persons" or "citizens."

And fourth, *Allen* declared that "[t]he achievement of the Act's laudable goal could be severely hampered ... if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556. That is as true of actions under section 10 of the Act as it is of those under section 5. The congressional goal of eliminating poll taxes could hardly be accomplished by denying relief under the Act to individuals who have been forced to pay a poll tax. Moreover, in *Allen* as in this case, the Attorney General has recognized the need for private actions to augment her efforts to enforce the statute. 393 U.S. at 557 n.23.

Allen has been followed in innumerable cases brought by private individuals under section 5, such as *Clark v. Roemer*, 500 U.S. 646 (1991). *Allen* has also been extended to allow private actions under other sections of the Voting Rights Act, notably section 2. *E.g.*, *Roberts v. Wamser*, 883 F.2d at 621. Section 2, like section 5 and section 10, explicitly protects "the right of any citizen of the United States to vote." This Court has rendered numerous decisions on the merits of cases brought by private individuals under section 2. *See, e.g.*, *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986). Just as *Allen* has been extended to section 2, so too, it applies to section 10. All three provisions are designed to

enforce the constitutional rights of individual citizens to vote.

D. *Contemporary and longstanding precedent, approved by Congress in amendments to the Voting Rights Act, requires implication of a private right of action*

Congressional intent to create a private right of action must be judged according to the context in which Congress acted. *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979). When Congress originally passed the Voting Rights Act in 1965, it acted in a context in which private rights of action were liberally implied. "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself." *Id.* at 718 (Rehnquist, J., concurring) (emphasis in original).

In particular, section 10 was enacted against the backdrop of decisions that recognized a private right of action claiming that poll taxes violated the Constitution and against the backdrop of decisions that consistently found implied private rights of action under federal statutes. This Court's then-recent decision in *Forssenius* had held that private individuals had standing to sue directly under the Constitution to challenge a poll tax. 380 U.S. at 533 n.6. That decision, in turn, was consistent with then-prevailing precedent that liberally recognized implied rights of action under federal statutes. "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964).

In *Cannon*, this Court relied upon decisions from the

same period to find an implied private right of action under a contemporaneously enacted statute, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. Title IX prohibits discrimination on the basis of sex by educational institutions that receive federal funds. It expressly provides only for a cutoff of funds as the means of enforcement. This Court nevertheless found an implied private right of action, relying heavily on *Allen*, but also on the overall approach of prevailing decisions when the statute was enacted. "In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." 441 U.S. at 699.[21]

This Court's decision in *Allen*, rendered in 1969, is compelling evidence of a similar assumption under the Voting Rights Act. Congress explicitly endorsed this assumption in 1975 when it amended section 3 and added section 14(f) to the Act. 42 U.S.C. §§ 1973a, 1973*l*(f). Both of these sections, as we have shown, created special procedures for actions that could be commenced either by the Attorney General, under the express provisions of the statute, or by

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[21] This Court used the same reasoning to find an implied private right of action under the Commodity Exchange Act (CEA), 7 U.S.C. §§ 1 et seq. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). Apart from a narrow provision for arbitration, that statute creates only public remedies for violations of the CEA. Yet this Court found an implied private right of action. "Prior to the comprehensive amendments to the CEA enacted in 1974, the federal courts routinely and consistently had recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA or rules and regulations promulgated pursuant to the statute." *Id.* at 379. "This Court, as did other federal courts and federal practitioners, simply assumed that the remedy was available." *Id.* at 380.

private individuals, through an implied right of action. *Roberts v. Wamser*, 883 F.2d at 621 & n.12. Both of these sections differed from *Allen* only in recognizing a broader range of implied private rights of action, including actions under section 10, that protect the constitutional right to vote.

Congress has not retreated from its recognition of implied private rights of action in more recent amendments to the Voting Rights Act. On the contrary in 1982, when Congress extensively amended section 2, 42 U.S.C. § 1973, Pub. L. 97-205, 96 Stat. 134 (1982), it made clear its intent to preserve private rights of action under the statute. "Finally, the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965. See *Allen v. Board of Elections*, 393 U.S. 544 (1969)." S. Rep. No. 97-417 at 30.

Exactly the same course of judicial and legislative developments -- implication of a private right of action, repeated decisions, and congressional amendment and reenactment -- have been held sufficient to support a private right of action. In *Merrill Lynch*, *supra*, this Court emphasized that Congress had amended the Commodities Exchange Act without disturbing the implied private right of action recognized by judicial decisions. "Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy." 456 U.S. at 378-79; *see Cannon*, 441 U.S. at 701-03 (relying on congressional acquiescence in decisions finding an implied private right of action). So, too, in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), this Court held for the first time that section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), created a private right of action. In that case, the Court relied in part on a comprehensive revision of the securities laws in 1975. *See id.* at 384-86. In doing so,

this Court used words that apply equally well to the Voting Rights Act: "Most significantly for present purposes, a private right of action under § 10(b) ... has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." *Id.* at 380.

In sum, section 10, like its constitutional forebears and sections 2 and 5 of the Voting Rights Act, is intended to protect the voting rights of individual citizens. Thus, like these other provisions, section 10 gives rise to a private cause of action by individuals whose rights have been denied.

CONCLUSION

This case represents a dramatic departure from well-settled law about the scope of section 5 and the right of private parties to enforce the Voting Rights Act. Accordingly, this Court should reverse the judgment of the court below.

Respectfully submitted,

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